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ALTA BATES SUMMIT MEDICAL CENTER;
RUSSELL D. STANTEN, M.D., LEIGH I.G. IVERSON, M.D., STEVEN A. STANTEN, M.D., and WILLIAM M. ISENBERG, M.D., Ph.D.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

COYNESS L. ENNIX, JR., M.D., as an individual and in his representative capacity under Business & Professions Code Section 17200 et seq.,

Plaintiff,

v.

RUSSELL D. STANTEN, M.D., LEIGH I.G. IVERSON, M.D., STEVEN A. STANTEN, M.D., WILLIAM M. ISENBERG, M.D., Ph.D., ALTA BATES SUMMIT MEDICAL CENTER and does 1 through 100,

Defendants.

CASE NO. C 07-2486 WHA

NOTICE OF MOTION, MOTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

[FED. R. CIV. PROC. 12(b)(6)]

DATE: July 5, 2007
TIME: 8:00 a.m.
DEPT: Ctrm. 9, 19th Flr.
JUDGE: Hon. William H. Alsup

COMPLAINT FILED: May 9, 2007
TRIAL DATE: No date set.

DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS

TO PLAINTIFF AND HIS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on July 5, 2007, at 8:00 a.m., or as soon thereafter as counsel may be heard in Courtroom 9 of the above-entitled Court, located at 450 Golden Gate Ave., 19th Floor, San Francisco, CA, Defendants Alta Bates Summit Medical Center; Russell D. Stanten, M.D.; Leigh I.G. Iverson, M.D.; Steven A. Stanten, M.D.; and William M. Isenberg, M.D., Ph.D.; will, and hereby do, move for an order, pursuant to Federal Rule of Civil Procedure 12(b)(6) dismissing with prejudice the Complaint filed by filed by Plaintiff Coyness L. Ennix, Jr., M.D. Alternatively, and also pursuant to Rule 12(b)(6), Defendants will and hereby do move for an order dismissing each individual cause of action asserted in the Complaint.

Defendants' motion pursuant to Rule 12(b)(6) is based upon this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the accompanying Request for Judicial Notice (the "RJN"), all pleadings and papers on file in this action, and such oral argument as may be presented to the Court at the time of the hearing.[1]

DATED: May 30, 2007

Respectfully submitted,

KAUFF McCLAIN & McGUIRE LLP

By: /S/
MATTHEW P. VANDALL

Attorneys for Defendants
ALTA BATES SUMMIT MEDICAL CENTER; RUSSELL D. STANTEN, M.D., LEIGH I.G. IVERSON, M.D., STEVEN A. STANTEN, M.D., and WILLIAM M. ISENBERG, M.D., Ph.D.

[1] This motion is being filed and served concurrently with Defendants' Special Motion to Strike pursuant to California Code of Civil Procedure section 425.16.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

A. Relief Requested.

As described above, Defendants Alta Bates Summit Medical Center (the "Medical Center"); Russell D. Stanten, M.D. ("Dr. Russell Stanten"); Steven A. Stanten, M.D. ("Dr. Steven Stanten"); Leigh I.G. Iverson, M.D. ("Dr. Iverson"); and William M. Isenberg, M.D., Ph.D. ("Dr. Isenberg") (collectively, "Defendants")[2] respectfully request that the Court enter an Order which (1) dismisses Plaintiff's Complaint with prejudice on the ground that none of the claims asserted therein are ripe for review because the Complaint fails to allege that the peer review actions at issue were overturned by a writ of mandate (*see Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 651 (9th Cir. 1988) (holding that disciplinary recommendations arising out of quasi-judicial proceedings are presumed correct "[u]ntil the review committee's decision is overturned by a writ of mandate"); *see also Kibler v. Northern Inyo County Local Hosp. Dist.*, 39 Cal. 4th 192, 200 (2006) (holding that hospital peer review proceedings are "quasi judicial proceedings" and are subject to judicial review by administrative mandate); (2) dismisses with prejudice Plaintiff's first cause of action for race discrimination in violation of 42 U.S.C. Section 1981 ("Section 1981") on the ground that Plaintiff has not alleged (and cannot allege) a racially motivated breach of his own contract with Medical Center (*see Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 480 (2006) (holding that "Section 1981 plaintiffs must identify injuries flowing from a racially motivated breach of their own contractual relationship, not of someone else's."); (3) dismisses with prejudice Plaintiff's second through fifth causes of action for violations of California law on the ground that the claims for relief are based upon communications which were absolutely privileged; (4) dismisses Plaintiff's third cause of action for violations of the Cartwright Act (Cal. Bus.

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[2] Drs. Russell Stanten, Steven Stanten, Iverson and Isenberg will also be referred to collectively in this memorandum as the "Individual Defendants".

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& Prof. Code §§ 16700 *et seq.*) on the ground that the Plaintiff has neither alleged a relevant market nor an antitrust injury; (5) dismisses Plaintiff's second through fifth causes of action arising under California law by declining to exercise supplemental jurisdiction over them; and (6) to the extent the Court allows Plaintiff to proceed in federal Court, dismisses with prejudice each of the 100 unnamed "Doe" defendants on the ground that this manner of pleading is disfavored in federal court.

B. Procedural History.

On April 3, 2007, Plaintiff commenced an action in the Superior Court of California for the County of Alameda entitled *Coyness L. Ennix, Jr., M.D., as an individual and in his representative capacity under Business & Professions Code § 17200 et seq. v. Russell D. Stanten, M.D., Leigh I.G. Iverson, M.D., William M. Isenberg, M.D., Ph.D., Alta Bates Summit Medical Center and does 1 through 100* (Case No. RG 07318658) (the "State Court Action"). RJN, Exh. A. Plaintiff voluntarily dismissed the State Court Action on May 10, 2007, the day after he filed the same claims against the same defendants in federal court. RJN, Exh. B (Voluntary Dismissal); Exh. C (Complaint).[3] Plaintiff neither sought nor obtained a writ of mandate in the State Court Action. *See* RJN, Exhs. A (at Prayer for Relief) and B.

The Complaint asserts five causes of action against the various defendants. The first claim charges the Medical Center (and Does 1-100) with race discrimination in violation of Section 1981 based upon unspecified "contractual duties" Plaintiff alleges he had "with Alta Bates Summit and his patients." *Id.*, ¶ 41 at p. 12:13. The four remaining claims assert violations of state law, including (a) race discrimination in violation of the Unruh Civil Rights Act against the Medical Center (and Does 1-100) (*id.*, ¶¶ 43-47); (b) violations of the Cartwright Act against the Individual Defendants (and Does 1-100) (*id.*, ¶¶ 48-51); (c) interference with the right to practice Plaintiff's profession

[3] Barring a new jurisdictional allegation, the State Court Action and the Complaint before this Court are the same. *Compare* RJN Exh. A (State Court Action) with Exh. C (Complaint).

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(*id.*, ¶¶ 52-55); and (d) violations of California Business & Professions Code section 17200, et seq. ("Section 17200") (*id.*, ¶¶ 56-59").

Defendants now respond with this motion to dismiss and a concurrently filed special motion to strike the Complaint pursuant to California's anti-SLAPP statute (Cal. Code Civ. Proc. § 425.16). Taken together, Defendants' motions seek the dismissal with prejudice of Plaintiff's lawsuit.

C. Statement of the Issues.

Plaintiff is an African American cardiac surgeon with current surgical privileges at six Bay Area hospitals, including the Medical Center.[4] Compl., ¶ 5. Like all other practicing physicians, Plaintiff is subject to peer review by his colleagues in a process mandated by state and federal law to insure patient safety and quality patient care. For example, the Health Care Quality Improvement Act (HCQIA), 42 U.S.C. §§ 11101 *et seq.* provides substantial immunity for the actions of physician committee members undertaking peer review in the reasonable belief that such actions are in furtherance of quality health care, particularly where the action is taken for imminent issues of patient safety. 42 U.S.C. § 11112(a). The HCQIA immunity provisions effectuate the Congressional findings upon which the HCQIA is predicated, including the finding that: "There is an overriding national need to provide incentive and protection for physicians engaging in effective peer review." 42 U.S.C. § 11101 (5). California law extends equivalent, if not greater, protection to physician peer review. "Peer review, fairly conducted, is essential to preserving the highest standards of medical practice." California Business & Professions ("B &P") Code § 809 (a) (3). These concerns lie at the heart of the California Supreme Court's *Kibler* and *Westlake* decisions. *See Kibler*, 39 Cal. 4th at 204 (affirming dismissal with prejudice of a hospital staff surgeon's claims

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[4] Plaintiff alleges that he "currently has surgical privileges at the Summit and Alta Bates Campuses of Alta Bates Summit, Doctors Hospital in San Pablo, Highland General Hospital in Oakland, San Ramon Medical Center in San Ramon, and Valley Care Hospital in Livermore." Compl., ¶ 5 at p. 3:11-14.

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against a hospital and certain individual physicians arising out a disciplinary recommendation by the hospital's peer review committee); *see also Westlake Comm. Hosp. v. Los Angeles Sup. Ct. (Kaiman)*, 17 Cal. 3d 465, 469 (1976) (holding that "an aggrieved doctor must first succeed in setting aside the quasi-judicial decision in a mandamus action before he may institute" a claim for damages).

Defendants are the Medical Center and certain individual physicians who were alleged participants in a thorough peer review of Plaintiff's performance as a cardiothoracic surgeon at the Medical Center's Summit Campus. Plaintiff contends that "Defendants sponsored, initiated and/or participated in a lengthy sham peer review process that falsely sought to blame Dr. Ennix for complications some patients experienced during or following cardiac surgery." Compl., ¶ 2 at p. 2:1-4. Plaintiff also claims that the peer review process was tainted by racial animus and that it was part of a conspiracy on behalf of the Individual Defendants to ruin his career. Apparently deciding that the federal immunity standards are more favorable to "sham peer review" claims, Plaintiff dismissed the State Court Action and now proceeds before this Court.

As discussed fully below, Plaintiff's Complaint, and each cause of action asserted therein, fails to state a claim upon which relief may be granted. First, the Complaint fails to allege that Plaintiff sought to overturn the peer review decisions at issue by first seeking a writ of mandate as required by law. Second, Plaintiff's Section 1981 claim fails because Plaintiff has not properly alleged the existence of a contractual relationship with the Medical Center. Third, each of the state law claims are based exclusively upon communications which were absolutely privileged under California law. Fourth, the Cartwright Act claim fails because Plaintiff has not properly alleged an antitrust injury. Fifth, because state law issues predominate in this action, the Court should decline to exercise supplemental jurisdiction over Plaintiff's state law claims. Finally, to the extent the Court allows Plaintiff to proceed in federal court at all, the Court should dismiss the unnamed "Doe Defendants" because this nebulous pleading standing is disfavored in federal court.

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II. THE FACT ALLEGATIONS OF THE COMPLAINT.

In 2003, as a partner of the East Bay Cardiac Surgery Center, Medical Group, (*see* Compl., ¶ 18), Plaintiff alleges that he "was the busiest surgeon performing cardiac procedures among the private doctors practicing at the Summit Campus." *Id.*, ¶ 19 at p. 6:1-2. In "January and February 2004, [Plaintiff] performed four minimally invasive cardiac surgery procedures" at the Summit Campus. *Id.*, ¶ 20 at p. 6:13-14. Plaintiff admits that he was the "only surgeon to have completed [such] procedures at that time" (*id.* at p. 6:21-22) and that he encountered problems with them such as "prolonged procedure time, increased blood usage and conversion to the more traditional approach" (*id.* at p. 6:15-16). The Chair of the Surgery Department[5] became aware of the problems Plaintiff experienced and "called for a moratorium" on the procedures "pending further evaluation". *Id.* at p. 6:20-21.

Plaintiff now contests the peer review process which followed. Specifically, Plaintiff challenges 11 "Professional Review Actions" which form the basis of all five causes of action at issue. *See* Compl., ¶ 40 (alleging that the Medical Center violated Section 1981 "[i]n taking the Professional Review Actions"); *id.*, ¶ 44 (same for Unruh claim); ¶ 48 (incorporating the Professional Review Actions into the Cartwright Act claim) and ¶ 49 (alleging that the Individual Defendants initiated "a sham peer review process" against Plaintiff which consisted of the Professional Review Actions); ¶54 (alleging that Defendants interfered with Plaintiff's right to practice medicine "[b]y taking the Professional Review Actions"); and ¶ 56 (that the "Professional Review Actions violate Business and Professions Code §§ 17200 *et seq.*").

Plaintiff alleges generally that the "Individual Defendants provided information to the SPRC, AHC, NMA and MEC that they knew to be false.[6] Compl., ¶ 35

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[5] Dr. Steven Stanten was the Chair of the Department of Surgery and the Chair of the Surgical Peer Review Committee ("SPRC") at the time. Compl., ¶ 19.

[6] Plaintiff uses the acronyms "SPRC", "MEC", "AHC", and "NMA" throughout his Complaint and he defines those terms as follows: (1) the "SPRC" was the Surgical Peer Review Committee at (con't.)

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at p. 11:1-2. He specifically alleges that those communications, as well as the decisions made based upon them, constitute the "Professional Review Actions" (*see id*: at p. 11:18-19): (1) the SPRC's decision to review [Plaintiff's] performance" (Id., ¶ 35 at pp. 11:2-3); (2) a report Dr. Isenberg sent to the Medical Board of California and the National Practitioner Data Bank stating that Plaintiff "suspended use of minimally invasive procedures while under investigation"[7] (*id.* at p. 11:5-7); (3) the MEC's and SPRC's assignment of Plaintiff's peer review to the AHC (*id.* at p. 11:7-9); (4) "the SPRC's failure to allow [Plaintiff] to address it regarding the issues (*id.* at p. 11:9-10); (5) "the AHC's referral of the matter to the sham peer review outfit NMA" (*id.* at p. 11:10); (6) "the suspension of [Plaintiff's] privileges based upon demonstrably false allegations that he neglected a patient" (*id.* at p. 11:10-11); (7) "Dr. Isenberg's second unwarranted suspension of [Plaintiff's] privileges" (*id.* at p. 11:11-12); (8) "the AHC's heavy reliance on the false, malicious and self-serving representations of [Plaintiff's] partners Russell Stanten and Iverson in their evaluation of the NMA report and [Plaintiff]s] performance" (*id.* at p. 11:12-14); (9) "the AHC's factually groundless report and recommendation" (*id.* at p. 11:14-15); (10) "the MEC's decision on that recommendation to require [Plaintiff] to practice only with a proctor present" (*id.* at p. 11:15-16); and (11) "the MEC's decision to continue the proctorship requirement despite the unanimous opinion of all six proctors that the requirement should be immediately lifted" (*id.* at p. 11:16-18).

(Continued)
the Summit Campus in early 2004; its membership included Dr. Steven Stanten (Chair), Dr. Russell Stanten, and Dr. Iverson; (2) the "MEC" is not defined in the Complaint but is an acronym Plaintiff uses to describe the "Medical Executive Committee" at the Summit Campus of the Medical Center (*see id.*, ¶ 12 p. 4:23) of which Dr. Isenberg was a member *(id.)*; (3) the "AHC" refers to the Ad Hoc Committee" created by Dr. "Isenberg and the MEC" to review the four minimally invasive procedures Plaintiff performed and "other generalized concerns" raised by the SPRC in April 2004 (*id.*, ¶¶ 22, 23); and (4) the "NMA" is defined as a "private, outside peer review organization called National Medical Audit" which reviewed ten of Plaintiff's cases "that had previously undergone peer review by the Summit Cardiac Surgery Peer Review Committee; NMA's involvement in Plaintiff's peer review was performed at the request of the AHC (*id.*, ¶ 24).

[7] Plaintiff admits that he "voluntarily suspended performing minimally invasive procedures before the SPRC decided to investigate his performance". Compl., ¶ 22:22-23.

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The specific peer review actions complained of are: (1) Dr. Isenberg's submission of a report to the Medical Board of California and the National Practitioner Data Bank stating that Dr. Ennix had voluntarily suspended performing minimally invasive procedures "while under investigation" (Compl., ¶ 22 at p. 7:21-25); (2) a May 11, 2005 summary suspension of Plaintiff's surgical privileges based upon Dr. Isenberg's belief that Plaintiff "had placed [a] double valve patient in danger by not making rounds on the patient" the day after the surgery and for "falsifying the [patient's medical record by] claiming he had seen the patient [the day after surgery]" (*id.*, ¶ 26 at pp. 8:27-9:2);[8] (3) Dr. Isenberg's and the Medical Center's insistence "that no hearing rights attached to the [summary suspension decision] because [Plaintiff] 'expressly stipulated' to surgical assisting in lieu of suspension" (*id.*, ¶ 28); (4) the MEC's September 7, 2005 decision to reinstate Plaintiff's "surgical privileges subject to the requirement that he have a proctor present" (*id.*, ¶ 29 at p. 9:17-20)[9]; (5) Dr. Isenberg's December 30, 2005 summary suspension of Plaintiff's "privileges without justification" for eight days (*id.*, ¶ 31); and (6) the MEC's April 19, 2006 decision to continue the proctoring restrictions through July 11, 2006" until a sufficient number of surgeries could be evaluated (*id.*, ¶¶ 32-33).

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[8] Plaintiff admits that he "did not himself note his rounds on the double valve patient because he was busy" (Compl., ¶ 25 at p. 8:23-24), but he contends that the summary suspension was unwarranted because he produced a nurse's letter indicating that he had "seen" the patient more than once the day after the surgery was performed (*id.*, ¶ 26 at p. 9:3-4). Specifically, Plaintiff disagrees with the MEC's May 18, 2005 decision upholding the summary suspension pending "the outcome of the AHC" peer review proceeding. *Id.*, ¶ 26 at p. 9:4-5.

[9] Plaintiff alleges that the MEC's proctoring decision was based upon the recommendations of the AHC which, in turn, were based upon the NMA's external peer review report criticizing Plaintiff's performance in ten surgical cases. *See* Compl., ¶¶ 24, 29. Subsequently, however, Plaintiff avers that the Medical Center offered him two choices in mid-October 2005: "either appeal the MEC's decision and remain suspended indefinitely or accept a condition that he have a proctor present at all his surgeries." *Id.*, ¶ 30 at p. 9:21-23. Plaintiff alleges that he opted for the proctoring restriction (*id.* at p. 9:24) and then "voluntarily separated from his business partners and began a solo cardiac surgery practice which he retains today" (*id.*, ¶ 30 at p. 9:24-27). The business partners Plaintiff chose to separate from were Dr. Iverson, Dr. Russell Stanten and Junaid Khan, M.D. *Id.*, ¶ 7.

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Thus, the entire Complaint is based upon communications made during or disciplinary recommendations arising out of peer review proceedings concerning Plaintiff's performance at Summit.

III. ARGUMENT.

A. The Motion To Dismiss Standard.

"A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of the pleadings." *Silvas v. E*Trade Mortg. Corp.*, 421 F. Supp. 2d 1315, 1317 (S.D. Cal. 2006); *see also North Star Int'l v. Arizona Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). "Dismissal is appropriate where the Complaint lacks a cognizable legal theory." *Id.*; *see also Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533-34 (9th Cir. 1984); *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989) ("Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law."). Although the court must assume the Complaint's factual allegations are true, "legal conclusions need not be taken as true merely because they are cast in the form of factual allegations." *Silvas*, 421 F. Supp. 2d at 1317. "Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) (citing *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994)).

B. The Court Should Dismiss the Complaint, or Alternatively Each Cause of Action Alleged Therein, Because it Fails to Allege that Plaintiff Set Aside the Peer Review Decisions in a Mandamus Action Before Instituting His Claims For Relief.

In *Westlake Comm. Hosp. v. Los Angeles Superior Ct. (Kaiman)*, 17 Cal. 3d 465, 483-484 (1976), the California Supreme Court established the rule that a doctor whose staff privileges were modified as a result of hospital peer review may not sue the hospital or the individuals involved in the decision without first taking all necessary steps to have the peer review decisions overturned:

> [B]efore a doctor may initiate litigation challenging the propriety of a hospital's denial or withdrawal of privileges, he must exhaust the available internal remedies afforded by the hospital. As we explain, this exhaustion of remedies principle

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> has long been applied in suits attacking the actions of comparable "private associations," and we conclude that the doctrine applies when a doctor sues in tort for monetary damages as well as when he seeks a judicial order compelling reinstatement or admission.

Id. at 469.

The holding and reasoning of *Westlake* apply squarely in this case. Plaintiff was required to take all administrative steps and then, if still aggrieved, to seek a writ of mandate reversing the challenged actions **before** bringing this lawsuit. *See id.* ("an aggrieved doctor must first succeed in setting aside the quasi-judicial decision in a mandamus action before he may institute a tort action for damages"). Because the Complaint fails to allege that Plaintiff sought a writ of mandate, each alleged cause of action fails as a matter of law. *See id.*; *see also Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 651 (9th Cir. 1988) (holding that in federal court "*Westlake* applies to all cases where a quasi-judicial decision is the basis of a cause of action" and therefore "[u]ntil the review committee's decision is overturned by a writ of mandate, it is presumed correct and a damage action based on state law may not be maintained").

First, Plaintiff fails properly to allege that he took any administrative steps with respect to most of the peer review decisions at issue. Indeed, Plaintiff admits that he (1) "voluntarily suspended performing minimally invasive valve procedures (Compl., ¶ 22); (2) proposed "surgical assisting" restrictions which the MEC accepted (*id.*, ¶ 27); and (3) agreed to certain proctoring restrictions (*id.*, ¶ 30). He does not allege that he pursued a hearing or any other administrative action contesting these decisions. Nor does Plaintiff allege that his efforts to overturn these decisions, if any, were thwarted.[10] The omissions are fatal to his claims.

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[10] Similarly, Plaintiff contests Dr. Isenberg's submission of an 805 Report to the California Medical Board (*see id.*, ¶ 22 at p. 7:21-25) as well Dr. Isenberg's December 30, 2005 summary suspension of Plaintiff's privileges "without justification" for eight days (*id.*, ¶ 31). He also complains of the MEC's April 19, 2006 decision to continue the proctoring restrictions through July 11, 2006" until a sufficient number of his surgeries could be evaluated (*id.*, ¶¶ 32-33). But (con't.)

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Second, Plaintiff's claim that he was denied a hearing is similarly unavailing. *See* Compl., ¶ 28 at p. 9:8-12 (alleging that Plaintiff "requested a hearing pursuant to Article VIII, Section 8.36 of the Medical Staff Bylaws to review [his May 11, 2005] summary suspension" and was denied "because Dr. Ennix 'expressly stipulated' to surgical assisting in lieu of suspension"). Even if Plaintiff was denied a hearing, that allegation alone does not entitle him to proceed with this lawsuit. Rather, "Code of Civil Procedure section 1085 anticipates the arbitrary or improper refusal by an association to hold a hearing and authorizes resort to a writ of mandate to compel such a hearing." *Payne v. Anaheim Memorial Med. Cntr.*, 130 Cal. App. 4th 729, 745 (2005) (internal citation omitted). Indeed, the existence of § 1085 mandamus "means that [Plaintiff's] recourse is elsewhere than in an immediate superior court action for damages and other relief." *Kaiser Foundation Hospitals v. Superior Court*, 128 Cal. App. 4th 85, 105-106 (2005). "Specifically, [Plaintiff] could have sought a writ of mandate from the superior court to compel the Hospital to begin the hearing." *See id.* Plaintiff alleges that he filed no such action. Therefore, under *Payne* and *Kaiser Foundation*, Plaintiff's claims based upon denied hearing rights fail.

If Plaintiff did not agree with the underlying decisions, he was obligated to exhaust his administrative remedies under *Westlake* or *Kaiser Foundation Hospitals* by pursuing a hearing and then seeking to overturn any adverse decision. Plaintiff cannot evade these requirements by disingenuously alleging that he "exhausted all administrative remedies available to him." *See* Compl., ¶ 36 at p. 11:25. To begin with, the Court is not "required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell*, 266 F.3d at 988; (citing *Clegg,* 18 F.3d at 754-55). The Court should disregard paragraph 36 on this

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(Continued)
the Complaints fails to allege that Plaintiff took **any** action to overturn these decisions prior to filing suit.

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basis. Further, Plaintiff intentionally obscures the mandamus issue by alleging that he exhausted only the remedies he perceived as "available to him." Compl., ¶ 36. The principles described above apply regardless of Plaintiff's subjective perception.

Finally, the Court may dismiss the Complaint and each individual cause of action asserted therein with prejudice. Although the Complaint should be dismissed on its face, Plaintiff likely will argue that any such dismissal be made with leave to amend. The Court, however, may deny leave to amend where amending the Complaint would be futile. *Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991) ("district court does not err in denying leave to amend where the amendment would be futile"). Plaintiff cannot allege that he overturned any of the Professional Review Actions through a mandamus proceeding without perjuring himself. Thus, any contrary amendments would be futile.

Therefore, Defendants respectfully request that the Court dismiss with prejudice the Complaint or, alternatively, each cause of action asserted therein.

C. The Court Should Dismiss Plaintiff's First Cause of Action for Violations of Section 1981 Because the Complaint Fails to State a Claim Upon Which Relief May Be Granted.

Plaintiff's first cause of action must be dismissed because the Complaint fails to allege the existence a contractual relationship between Plaintiff and the Medical Center sufficient to state a claim for relief under Section 1981. *See Domino's Pizza*, 546 U.S. at 480 (holding that "Section 1981 plaintiffs must identify injuries flowing from a racially motivated breach of their own contractual relationship, not of someone else's.").

In *Domino's Pizza*, the Supreme Court ruled that a plaintiff "who lacks any rights under an existing contractual relationship with the defendant, and who has not been prevented from entering into such a contractual relationship" may not file suit under Section 1981. 546 U.S. at 472, 480. The *Domino's Pizza* plaintiff (McDonald) was the "sole shareholder and president of JWM, Investments, Inc." *Id.*, at 472. JWM and Domino's Pizza (rather than McDonald and Domino's Pizza) entered into several contracts through which JWM would construct restaurants and lease them to Domino's. *Id.* "The gravamen of McDonald's complaint was that Domino's had broken its contracts

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with JWM because of racial animus toward McDonald, and that the breach had harmed McDonald personally by causing him 'to suffer monetary damages'." *Id.* at 473. In deciding to maintain the contractual privity requirement for Section 1981 claims, the Supreme Court emphasized that it has "never retreated from what should be an obvious reading of the text of the statute:

> *Section 1981* offers relief when racial discrimination blocks the creation of a contractual relationship, as well as when racial discrimination impairs an existing contractual relationship, so long as plaintiff has or would have rights under the existing or proposed contractual relationship.

Id. at 476. Therefore, because no contractual relationship was alleged to exist between the plaintiff and the defendant, the Court dismissed the Section 1981 claim pursuant to Rule 12(b)(6). *Id.* at 474, 480.

Plaintiff's Section 1981 here claim fails for similar reasons. Plaintiff has not alleged (and cannot allege) a direct contractual relationship with the Medical Center because none exists. Plaintiff does allege that the Professional Review Actions (defined above) and "discrimination concerned [Plaintiff's] abilities to perform his contractual duties with Alta Bates Summit and his patients and [Plaintiff's] abilities to enjoy the benefits, privileges, terms, and conditions of those contractual relationships." Compl., ¶ 41. But these general assertions are not sufficient to survive Defendants' motion to dismiss unless they are supported by the remaining allegations of the Complaint. *See Clegg*, 18 F.3d at 756 (dismissing with prejudice a claim arising under Title II (42 U.S.C. § 2000a) which was based upon a conclusory statement concerning the statute's applicability but contained no allegations supporting that conclusion). The Complaint merely alleges that:

- "During the period of time relevant to this suit, Dr. Ennix, Defendant Russell Stanten, Defendant Leigh Iverson, and Junaid Khan, M.D. co-owned a cardiac surgery partnership known as East Bay Cardiac Surgery Center, Medical Group (the "Surgery Center") (¶ 7 at p. 4);
- "In the fall of 2001, Dr. Ennix merged his practice with that of Junaid Khan, M.D. , and Defendants Iverson

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and Russell Stanten to form the [Surgery Center]" (¶ 18 at p. 5:24-25);

- "In 2003 [and through the Surgery Center], Dr. Ennix was the busiest surgeon performing cardiac procedures among the private doctors practicing at the Summit Campus" (¶ 19 at p. 6:1-2); and
- "On October 25, 2005, Dr. Ennix voluntarily separated from his business partners, secured six staff cardiac surgeons from the Kaiser Permanente Medical Group to serve as proctors, and began a solo cardiac surgery practice which he retains today" (¶ 30 at p. 9:24-27).

These specific allegations do not support the general conclusion that "contractual duties" were created or that "contractual relationships" exist (or have ever existed) between the Medical Center and Plaintiff.[11] Those general conclusions should therefore be disregarded under *Clegg*. Without these conclusory references, Plaintiff fails properly to allege injuries flowing from a racially motivated breach of his own contractual relationship, rather than, for example, a contractual relationship between his former partnership (the Surgery Center) or his current solo practice and the Medical Center. Thus, his Section 1981 claim should be dismissed under *Domino's Pizza*.

Although the Section 1981 claim should be dismissed on its face, Plaintiff likely will argue that any such dismissal be made with leave to amend. The Court, however, may deny Plaintiff's leave request because any such amendment would be futile. *Saul*, 928 F.2d 829 at 843. Plaintiff is well aware that he does not have and has never had a direct contractual relationship with the Medical Center.[12] Thus, any

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[11] Similarly, these allegations neither support nor refute (indeed, they utterly fail to address) the conclusion that Plaintiff owes contractual duties to or has a contractual relationship with either his or the Medical Center's patients.

[12] Indeed, Plaintiff admitted this fact at deposition. *See* McClain Decl., Exh. A (Plaintiff's Depo., Vol. I) at pp. 36-41 (admitting that Plaintiff never had a contract with the Medical Center), filed in support of Defendants' motion to strike. The Court need not consider Plaintiff's dispositive admission in ordering the requested relief. *See Clegg*, 18 F.3d 752 at 756 (dismissing with prejudice a federal claim based upon a conclusory allegation which was not supported elsewhere in the Complaint). However, the Court may, in its discretion, consider Plaintiff's admission in deciding whether to order dismissal of the Section 1981 claim with or without leave to amend.

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amendment suggesting otherwise would be futile. Therefore, Defendants respectfully request that the Court dismiss Plaintiff's first cause of action with prejudice.

D. The Court Should Dismiss Plaintiff's Second, Third, Fourth and Fifth Causes of Action Because the State Law Claims Are Precluded By the Absolute Privilege Contained in California Civil Code § 47.

California Civil Code § 47 confers an absolute privilege upon communications made "[i]n the proper discharge of an official duty" in an "official proceeding authorized by law." Civ. Code § 47(a) & (b)(3), (4). As explained above, peer review proceedings are one example of "official proceeding authorized by law" that are absolutely privileged. *Kibler*, 39 Cal. 4th at 202 (Section 47 includes "within that statute's official-proceedings privilege the proceedings of a medical peer review committee."). The absolute privilege applies regardless of whether the communications were made with an improper motive. *Joel v. Valley Surgical Ctr.*, 68 Cal. App. 4th 360, 372 (1998) ("Therefore, even if Dr. Joel was able to prove ValleyCare's report to this agency was improperly motivated, the communication is still entitled to absolute immunity.").

Indeed, courts have applied § 47 in circumstances analogous to the facts of this case. For example, in *Ascherman v. Natanson,* 23 Cal. App. 3d 861. 864 (1972), a physician who was the subject of a hospital peer review sued another physician alleging false statements made in preparation for a peer review hearing. The Court ruled that the statements, even though not made during the hearing itself, were subject to an absolute privilege. *Id.* at 866-67. In so ruling, the Court recognized the exceedingly broad scope of § 47. Specifically, communications are absolutely privileged "if they are some way related to or connected with a pending or contemplated action." *Id.* at 865. Similarly, the Court in *Joel*, 68 Cal. App. 4th at 371, held that a "report to the National Practitioner Data Bank was absolutely privileged under Civil Code section 47."

In addition to § 47, a second absolute privilege is created by California Business & Professions Code § 805(j), which expressly provides that "[n]o person shall incur **any** civil or criminal liability as the result of making any report required by this

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section" (emphasis added).[13] Here, applying both § 47 and § 805(j), each of the "Professional Review Actions" challenged by Dr. Ennix are either "in some way related to or connected with" or involve reports to the Medical Board of California and the National Practitioner Data Bank. All of these actions are absolutely privileged and therefore cannot be used as the basis for liability. Because the communications underlying the Professional Review Actions are absolutely privileged, Plaintiff's state law causes of action should be dismissed with prejudice.

E. The Court Should Dismiss Plaintiff's Third Cause of Action For Violations of the Cartwright Act Because Plaintiff Fails to State a Claim Upon Which Relief May Be Granted.

"To establish a [restraint of trade violation under the Cartwright Act;] a Plaintiff must demonstrate three elements: (1) an agreement, conspiracy, or combination among two persons or business entities; (2) which is intended to harm or unreasonably restrain competition; and (3) which actually causes injury to competition, beyond the impact on the claimant, within a field of commerce in which the claimant is engaged." *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 811 (9th Cir. 1988) (affirming dismissal of state antitrust claims for failure to satisfy these criteria)[14] (*citing Rickards v. Canine Eye Registration Found.*, 783 F.2d 1329, 1332 (9th Cir. 1986), *cert.*

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[13] In particular, § 805(b)(3) requires that the "chief of staff of a medical or professional staff shall file an 805 report with the relevant agency [e.g., the Medical Board of California]" if "[r]estrictions are imposed, or voluntarily accepted, on staff privileges . . . for a cumulative total of 30 days or more. . . ." Plaintiff alleges that Dr. Isenberg was "the President of the Medical Staff at the Summit Campus" (Compl., ¶ 12) and that "submitted [an 805] report to the Medical Board of California" after Plaintiff "voluntarily suspended performing the minimally invasive procedures" (*id.*, ¶ 22 at p. 7:21-24). Thus, on its face, Dr. Isenberg's provision of a report concerning a suspension of Plaintiff's privileges lasting for "fourteen months" (*see id.*, ¶ 34 at p. 10:16) was a communication absolutely privileged under § 805(j). In other words, Dr. Isenberg did what he was required by law to do – i.e., file the 805 Report concerning Plaintiff's suspension, whether the restriction on surgical privileges was voluntary or not. *See Joel*, 68 Cal. App. 4th at 371 (dismissing physician's complaint based on a § 805 Report because that the reports issued by the defendant hospital were not actionable under the absolute immunity provisions of § 805).

[14] *McGlinchy* involved claims arising under both the Sherman Act and the Cartwright Act. 845 F.2d at 810. The 9th Circuit recognizes that "Cartwright Act claims raise basically the same issues as do Sherman Act claims" and that "[its] conclusion with regard to the Sherman Act claims applies with equal force to appellants' Cartwright Act claims." *McGlinchy*, 845 F.2d at 812 n. 4.

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denied 479 U.S. 851. "To determine whether a practice unreasonably restrains trade, [the Ninth Circuit applies] a 'rule of reason' analysis." *Bhan v. NME Hospitals, Inc.*, 929 F.2d 1404, 1410 (9th Cir. 1991) (affirming grant of summary judgment of antitrust claims concerning the exclusion of a class of nonphysician anesthesia providers from a hospital). Under *McGlinchy*:

> Proof that the defendant's activities had an impact upon competition in a relevant market is an absolutely essential element of the rule of reason case. It is the impact upon competitive conditions in a definable market which distinguishes the antitrust violation from the ordinary business tort.

845 F.2d at 812-813. Thus, in order to proceed with his Cartwright Act claim, Plaintiff must first plead (and ultimately must prove) both the relevant market and a competitive injury. *Id.* at 813. Moreover, these elements must be pled with specificity. *G.H.I.I. v. Mts, Inc.*, 147 Cal. App. 3d 256, 265 (1983) (requiring a "high degree of particularity in the pleading of Cartwright Act violations") (*quoting Chicago Title Ins. Co. v. Great Western Financial Corp.*, 69 Cal.2d 305, 326-328 (1968)). Plaintiff's Cartwright Act claim should be dismissed because it fails properly to allege either the relevant market or a competitive injury.

1. Plaintiff's Cartwright Act Claim Should Be Dismissed For Failure to Allege a Relevant Market.

Plaintiff's Cartwright Act claim fails because the Complaint does not define the relevant market. *See McGlinchy*, 845 F.2d at 813. Plaintiff alleges that the "purpose of the conspiracy was to restrain trade by eliminating Dr. Ennix from the pool of lead cardiac surgeons available in his region." Compl., ¶ 50. This is not a definable market. Indeed, Plaintiff does not describe the region he is referring to and he does not describe what the phrase "pool of lead cardiac surgeons" means. Nor is there any indication of the number of hospitals operating in this "market" or the number of "lead cardiac surgeons" practicing within it. Plaintiff does allege, however, that he is a "lead cardiac surgeon" and that he "currently" has staff privileges at six different hospitals in Northern California. *Id.*, ¶ 5 at p. 3:11-14. Presumably, the market is some larger, undefined

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region which contains hospitals at which Plaintiff's privileges actually were eliminated. The present allegations, however, fail to support a claim for relief under the Cartwright Act and the Court should dismiss the third cause of action.

2. Plaintiff's Cartwright Act Claim Should Be Dismissed For Failure to Allege a Competitive Injury.

Plaintiff's Cartwright Act claim fails because it alleges an injury to Plaintiff alone, rather than an injury to competition. "It is injury to the market or to competition in general, not merely injury to an individual or individual firms that is significant" in a Cartwright Act claim. *McGlinchy*, 845 F.2d at 811 (*citing Ralph C. Wilson Indus.* v. Chronicle Broadcasting Co., 794 F.2d 1359, 1363 (9th Cir. 1986); *Fine v. Barry Enright Prods.*, 731 F.2d 1394, 1399 (9th Cir. 1984), *cert. denied*, 469 U.S. 881); *see also Hilton v. Children's Hosp.--San Diego,* 2007 U.S. Dist. LEXIS 16517, *16 (S.D. Cal. Mar. 7, 2007) (holding that "[i]n the absence of a showing that the market as a whole has been affected, the fact that one competitor must practice elsewhere is not an antitrust injury."); *Stationary Eng'rs Local 39 Health & Welfare Trust Fund v. Philip Morris, Inc.*, 1998 U.S. Dist. LEXIS 8302. *28-*29 (N.D. Cal. 1998) (holding that "antitrust claims are an inappropriate remedy" where "plaintiff's complaint ultimately seeks recovery for personal injury"); *Cel-Tech Communications v. L.A. Cellular Tel. Co.,* 20 Cal. 4th 163, 186 (Cal. 1999) ("Injury to a competitor is not equivalent to injury to competition; only the latter is the proper focus of antitrust laws.").

Here, Plaintiff asserts that (1) the Individual Defendants conspired "to impose unwarranted and professionally and financially devastating restrictions on his surgical privileges" (Compl., ¶ 49); (2) the purpose of the conspiracy was to eliminate him "from the pool of lead cardiac surgeons available in his region" (*id.*, ¶ 50) and (3) he was the only one injured by the alleged conspiracy *(id.*, ¶ 51 (Plaintiff "suffered damages proximately caused by Defendants' conspirational conduct")). These allegations describe an ordinary business tort, not an antitrust violation. Indeed, each allegation is specific to Plaintiff rather than to the market as a whole or to competition generally.

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Even assuming that Plaintiff is a competitor of the Individual Defendants,[15] his third cause of action alleges nothing more than the economic injuries he incurred as a result of peer review. And "economic injury to a competitor does not equal injury to competition." *McGlinchy*, 845 F.2d at 812 (quoting *Cascade Cabinet Co.*, 710 F.2d at 1373.

Plaintiff's failure to allege injury to competition is a proper ground for dismissal of the third cause of action. *See McGlinchy,* 845 F.2d at 813; *see also Seattle Totems Hockey Club v. National Hockey League* , 783 F.2d 1347, 1350 (9th Cir. 1986), *cert. denied*, 479 U.S. 932.

F. The Court Should Decline to Exercise Supplemental Jurisdiction Over Plaintiff's State Law Claims.

To be clear, Defendants contend that the Court may properly dismiss the Complaint and each cause of action asserted therein, as described above. If, however, the Court decides not to do so, Defendants respectfully request that the Court either: (a) decline to exercise supplemental jurisdiction over the state law claims once the Section 1981 claim is dismissed; or (b) decline to exercise supplemental jurisdiction over the state law claims whether or not the Section 1981 claim is dismissed.

1. If the Court Dismisses Plaintiff's Section 1981 Claim, It Should Decline to Exercise Supplemental Jurisdiction Over the Remaining State Law Claims Under 28 U.S.C. § 1367(c)(3).

28 U.S.C. Section 1367(c)(3) provides that the Court may decline to exercise supplemental jurisdiction over pendant state law claims if "the district court has dismissed all claims over which it has original jurisdiction." *See also Dymits v. City & County of San Francisco, 1998 U.S. App. LEXIS 30051*, *4 (9th Cir. 1998). "It is

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[15] Defendants do not concede that Plaintiff is a competitor. Indeed, Plaintiff alleges that "[d]uring the period of time relevant to this suit, Dr. Ennix, Defendant Russell Stanten, Defendant Leigh Iverson and Junaid Khan, M.D. co-owned a cardiac surgery partnership known as East Bay Cardiac Surgery Center, Medical Group." Compl., ¶ 7. Moreover, Plaintiff alleges that he "is a certified cardiac and thoracic surgeon" (*id.*, ¶ 5) but that Dr. Steven Stanten is a "general surgeon" (*id.*, ¶ 21 at p. 6:28) and Dr. Isenberg is an "obstetrician and gynecologist" (*id.*, ¶ 31 at p. 10:2). It is absurd for Plaintiff to suggest that he and Drs. Steven Stanten and Isenberg ever competed for the same patients.

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appropriate to decline Supplemental jurisdiction under § 1367(c)(3) when it serves objectives of economy, convenience and fairness to the parties, and comity." *M.J. v. Clovis Unified Sch. Dist.*, 2007 U.S. Dist. LEXIS 28761, *38 (E.D. Cal. 2007) (citing *Trustees of Construction Industry and Laborers Health, et al. v. Desert Valley Landscape & Maintenance, Inc.*, 333 F.3d 923, 925 (9th Cir. 2003)). Provided the Court dismisses Plaintiff's Section 1981 claim, the only federal question at issue here, then it should dismiss Plaintiff's remaining state law claims with leave to re-file them in state court.

First, fairness dictates that the Court decline the exercise of supplemental jurisdiction in this case. To begin with, Plaintiff began this action in state court and he cannot credibly maintain that he would suffer prejudice from any order the Court might issue which requires Plaintiff to proceed with this case as he originally intended. More importantly, however, fairness requires that Plaintiff return to state court because Defendants will be unduly prejudiced if the purely state law claims remain in federal court. For example, if the Court exercises supplemental jurisdiction over the pendant claims, it is arguable that the state laws of privilege which the Defendants relied upon in making the "peer review decisions" at issue would not apply. *See e.g.*, *Burrows v. Redbud Community Hospital District*, 187 F.R.D. 606, 610-11 (N.D. Cal. 1998) ("[s]tate privilege law applies to purely state law claims brought in federal court pursuant to diversity jurisdiction [,] ... [s]tate law claims that are pendent to federal question cases are governed by federal privilege law."). Plaintiff should not be rewarded for alleging a sham Section 1981 claim by allowing his pendant claims to proceed in federal court.

Second, judicial economy, convenience and comity would all best be served by requiring the state court to resolve purely state law claims. To begin with, the pendant claims arise from the allegation that "Defendants sponsored, initiated and/or participated in a lengthy sham peer review process that falsely sought to blame Dr. Ennix for complications some patients experienced during or following cardiac surgery". Compl., ¶ 2 at p. 2:1-4. The California legislature elected to "opt out" of the federal peer review system embodied in the Health Care Quality Improvement Act (42 U.S.C.

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§§ 11101 *et seq.*) and to "design its own peer review system." B&P § 809(a)(2). The state courts are better equipped to decide purely state law issues arising out of a complex state regulatory scheme.

Third, this case remains at a preliminary stage. Dismissing the pendant claims now and requiring Plaintiff to proceed with them in state court will not impose a significant financial burden on the parties.

Therefore, Defendants respectfully request that the Court dismiss Plaintiffs' second, third, fourth and fifth causes of action by declining to exercise supplemental jurisdiction over them.

2. If the Court Allows Plaintiff to Proceed With His Section 1981 Claim, It Should Decline to Exercise Supplemental Jurisdiction Over the Pendant Claims Under 28 U.S.C. § 1367(c)(2).

"[T]he federal court need not 'tolerate a litigant's effort to impose upon it what is in effect only a state law case.'" *Johnson v. Calagna*, 2006 U.S. Dist. LEXIS 85252, *2-*3 (E.D. Cal. 2006). Instead, the Court may decline to exercise supplemental jurisdiction over Plaintiff's state law claims if the state claims "substantially predominate[] over the claim or claims over which the district court has original jurisdiction." 28 U.S.C. § 1367(c)(2). Once it becomes clear "that a state claim constitutes the real body of a case, to which the federal claim is only an appendage, the state claim[s] may fairly be dismissed." *Id.* at *3. In deciding whether to dismiss the pendant claims, the Court should evaluate considerations of judicial economy, convenience, fairness and comity. *Id.* The court, however, is not required to provide any reasons for a dismissal under 28 U.S.C. § 1367(c)(2). *San Pedro Hotel Co. v. City of Los Angeles*, 159 F.3d 470, 478-79 (9th Cir. 1998) ("the district court did not abuse its discretion by failing to provide stated reasons for its dismissal under 28 U.S.C. § 1367(c)(2)").

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Plaintiff's state law claims plainly predominate here. Of the 16 claims at issue,[16] only 1 is premised upon a federal question: the Section 1981 claim against the Medical Center. As described above, that claim is specious at best and is plainly secondary to the discrimination, conspiracy, tortious interference and unfair business practices issues which will drive this litigation. Moreover, each of the claims asserted against the Individual Defendants are state law causes of action (a total 12 of the 16 claims at issue). Further, Plaintiff's decision to commence this action in state court irrefutably demonstrates that state court issues predominate here. Given that the vast majority of claims at issue are directed against the Individual Defendants and are based upon state law causes of action, the Court should find that the state law issues predominate here.

For the reasons set forth in the immediately preceding Section, fairness, judicial economy, convenience and comity are all best-served by dismissing the pendant claims now.

Therefore, Defendants respectfully request that the Court dismiss Plaintiff's second, third, fourth and fifth causes of action by declining to exercise supplemental jurisdiction over them.

G. To the Extent The Court Allows Plaintiff to Proceed With His Claims in Federal Court, the Doe Defendants Should Be Dismissed from the Complaint.

Insofar as Plaintiff is allowed to proceed at all before this Court, the unnamed or "Doe" defendants should be dismissed. *See Gillespie v Civiletti*, 629 F.2d 637, 642 (9th Cir 1980) ("the use of a 'John Doe' defendant is disfavored."); *see also Delos Santos v. Potter*, 2007 U.S. Dist. LEXIS 25918, *6 (N.D. Cal. Mar. 26, 2007) ("The court disfavors such nebulous pleading because (1) a Doe defendant cannot be

[16] The Complaint contains five causes of actions alleged variously against five defendants. The first two causes of action are alleged against the Medical Center alone. The third cause of action is alleged against each of the four Individual Defendants. And the last two causes of action are alleged separately against each of the five defendants. There are, thus, sixteen claims at issue.

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effectively served, (2) the court cannot determine that a Doe defendant is a real person or entity who could be sued in federal court, (3) the court cannot determine if a Doe defendant is subject to any type of immunity and (4) the court cannot determine if plaintiff's suit could survive a Doe defendant's motion to dismiss or motion for summary judgment." *Id.* The Complaint provides no indication of the effort Plaintiff took to identify Doe Defendants prior to filing this lawsuit. Moreover, it is clear that Plaintiff had no regard for the Federal Rules of Civil Procedure prior to filing the Complaint. *See* Compl., ¶ 14 (alleging that Plaintiff "sues such [Doe] Defendants by fictitious names pursuant to California Code of Civil Procedure § 474). The Court should not countenance such shoddy pleading. Therefore, Defendants respectfully request that the Court dismiss each of the "Doe" defendants from the Complaint insofar as it allows Plaintiff to proceed with any claims in federal court.

IV. CONCLUSION.

For each of the reasons described above, Defendants respectfully request the Court dismiss the Complaint with Prejudice. Alternatively, Defendants request the Court dismiss each of Plaintiff's individual causes of action.

DATED: May 30, 2007

Respectfully submitted,

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